Filed 2/26/19 In re B.C. CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re B.C., a Person Coming Under the Juvenile Court Law.	
HUMBOLDT COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. J.C., ET AL. Defendants and Appellants.	A153816 (Humboldt County Super. Ct. No. JV170127)

J.C. (Father) and B.K. (Mother) appeal from a disposition order in a proceeding commenced as to their daughter B.C. (Minor) under Welfare and Institutions Code section 300.[1] They contend (1) respondent Humboldt County Department of Health and Human Services (Department) and the juvenile court failed to satisfy their duties with respect to the Indian Child Welfare Act (ICWA; 25 U.S.C. §§ 1901 et seq.); and (2) there was insufficient evidence to support the court's jurisdictional findings under section 300, subdivisions (b) and (j). We will affirm.

[1] Except where otherwise indicated, all statutory references are to the Welfare and Institutions Code.

I. FACTS AND PROCEDURAL HISTORY

Mother and Father have two children, the Minor (born June 2017) and her sibling V.C. (born May 2016). For context, we begin our discussion with the proceedings regarding the Minor's sibling.

A. Proceedings Regarding Sibling

1. Initial Removal and Return

The Department received a referral regarding V.C. (Sibling) in May 2016. At the time of her birth, Sibling tested positive for methamphetamine and amphetamine, and Mother tested positive for methamphetamine, amphetamine, and THC. Mother told social workers that she started using methamphetamine around 2012, used it during her pregnancy as late as three days before Sibling's birth, and had been in jail from October 2015 to January 2016 due to a domestic violence incident with Father.

Mother later signed up for the "Healthy Moms" treatment program, but she stopped attending in June 2016 and continued to test positive for THC and opiodes. Father had been convicted of possessing a controlled substance in May 2016. Mother was cited in August 2016 for possession of a controlled substance, possession of concentrated cannabis, possession of drug paraphernalia, and violation of a domestic violence restraining order.

In October 2016, the social worker met with Mother and Father at what they represented to be their new home, and Mother claimed she had an intake appointment with the Humboldt County Alcohol and Other Drugs program (AOD). Sibling was then returned to her parents' care with court-ordered maintenance services.

2. Family Maintenance Period

When social worker Ashley Powell attempted to meet with Mother and Father at their purported new home, the landlord disclosed that they had never lived there. Powell tried to contact them by phone, to no avail. Between November 2016 and April 2017, the Department tried unsuccessfully to contact them at motels in the county. Powell later learned that the last time Sibling was seen by a doctor was in November 2016, having missed appointments in February and March 2017.

Father's AOD counselor reported that Father's attendance at group meetings was sporadic and his last drug test from October 2016 was diluted, counting as a positive test. Mother did not complete a drug test arranged for her in October 2016 or a hair follicle test in December 2016; nor did she follow through with AOD treatment.

3. Second Removal of Sibling and Disposition

In April 2017, the Department filed a petition under section 387, and Sibling was placed into protective custody. According to the Department, Mother admitted to social workers that she had used drugs approximately three times during the prior three months. When Powell asked Mother to undergo a hair follicle test, Mother "expressed hesitation." At a later meeting with Powell and social worker Rebecca Shuflin, Mother and Father exhibited rapid speech, watering eyes, frequent yawning, and inability to stay on subject. Father reported that he was using methamphetamine and was interested in residential treatment; Mother claimed she would seek residential treatment.

In May 2017, Mother told Shuflin that she attended the Healthy Moms' program twice and tested clean, but Healthy Moms informed Shuflin that Mother was *not* enrolled in or attending the program. Mother subsequently informed Shuflin that she was pregnant and still actively using methamphetamine. Meanwhile, Father's AOD counselor reported that Father had missed five of eight group meetings in the prior month and admitted using methamphetamine.

At a disposition hearing for the section 387 petition on June 7, 2017, the juvenile court found by clear and convincing evidence that it would be detrimental to return Sibling to her parents' custody, found that the parents had received the maximum amount of services allowed and the time for services had expired, bypassed services for both parents, and set a section 366.26 hearing.

Mother and Father filed petitions in this court, seeking extraordinary writ relief from the order setting the section 366.26 hearing. We dismissed the petitions as untimely (A153498). We also denied Father's later habeas petition, in which Father claimed his attorney was ineffective for failing to file the writ petition on time (A154663).

B. Proceedings Regarding the Minor

While proceedings continued with respect to Sibling,[2] proceedings commenced as to the Minor.

1. Detention

On June 30, 2017, the Department received a referral regarding the Minor, who was born on that date. The Minor was placed into protective custody in light of the parents' prior history with Sibling.

In July 2017, the Department filed a petition alleging that the Minor was described in subdivisions (a), (b), and (j) of section 300. It was alleged that Mother and Father abused methamphetamine, which caused serious physical harm to the Minor; the Minor was exposed to methamphetamine in utero and began exhibiting withdrawal symptoms the day after her birth; Father knew of Mother's substance abuse and failed to protect the Minor; the parents' substance abuse placed the Minor at risk; Mother stated she was actively using methamphetamine; the Minor was at substantial risk of being abused or neglected due to the parents' abuse or neglect of Sibling, arising out of their unresolved substance abuse; and Mother had failed to make progress in her case plan with respect to Sibling and reunification services had been terminated.

The juvenile court found that the Department made a prima facia case for detention and ordered the minor detained.

2. Jurisdiction

The Department's jurisdictional report advised that the Department had received 13 referrals regarding Mother, including referrals involving the Minor, Sibling, and the

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[2] Mother and Father each filed a section 388 petition in the juvenile court to vacate the June 2017 disposition order as to Sibling. The court denied these petitions in December 2017. Mother and Father also filed "amended" section 388 petitions as to Sibling. In March 2018, the court denied their amended section 388 petitions, terminated their legal rights as to Sibling, and confirmed adoption as Sibling's permanent plan. We affirmed these orders in an unpublished opinion in *Humboldt County Department of Health and Human Services v. J.C.* (Oct. 29, 2018, A153899) [nonpub. opn.].

Minor's half-sibling for whom a guardianship was ordered in 2013. The Department had also received two referrals regarding Father.

The Department maintained that Mother reported active methamphetamine use and the Minor exhibited jitteriness attributable to withdrawal. The Department also described social worker Shuflin's notes from a conversation with Mother in May 2017, which included Mother's admission that she used methamphetamine during her pregnancy. In addition, the Department expressed ongoing concerns about housing: social workers went to the home of Mother's father, where Mother was purportedly living, but neighbors stated that only another individual lived there. The court set a jurisdictional hearing for the Minor for October 2, 2017.

In the interim, the Department filed an amended petition in September 2017 with allegations pursuant to subdivisions (a), (b), and (j) of section 300.

In an addendum to its jurisdictional report, the Department wrote that Mother was too overwhelmed with the Healthy Moms program to continue. Although she had claimed she was transitioning to phase two of the program, Mother later admitted she had not. While the case plan as to Sibling had required her to complete a domestic violence program, Mother's attendance was verified only as to two of the 52 classes. The parents displayed a pattern of engaging only minimally in services and providing conflicting information, which indicated they were in the very early phase of recovery and not ready to care for two vulnerable babies (Sibling and Minor). In addition, they argued during visits, Sibling exhibited concerning behaviors during the visits, and the parents' living situation was uncertain.

At the contested jurisdictional hearing on October 2, 2017, the juvenile court sustained the amended allegations under subdivisions (b) and (j) of section 300, based on the parents' substance abuse issues, previous neglect of Sibling, and failure to comply with the case plan as to Sibling. As to subdivision (b), the court found that the Minor was at substantial risk of suffering serious emotional or physical harm due to Father's ongoing substance abuse and Mother's history of substance abuse and failure to complete court-ordered programs addressing those problems. As to subdivision (j), the court found

the Minor at substantial risk of being abused or neglected due to Mother's and Father's abuse or neglect of Sibling due to their unresolved substance abuse. The court granted the Department's motion to dismiss the allegation under section 300, subdivision (a).

3. Disposition

The Department's disposition report recounted Father's "lengthy history of substance abuse issues," Mother's "history of problematic substance abuse," and Mother's arrests for domestic violence and violation of a domestic violence restraining order. It further noted that the parents had not been in regular communication with the Department; Shuflin had not been allowed to go to the parents' home to assess their living environment since July 2017; the parents' reports of their living situation were inconsistent; and the parents were claiming that their attorney instructed them not to communicate with the Department. The report advised: "It is the Department's conclusion, based on the previous pattern of behavior and current position of the parents, that there is no way [the Minor] could be safely returned to the care of the parents at this time."

The report also recommended that the court bypass services to the parents under section 361.5, subdivision (b). The report described the history of Sibling's case, including the facts that Mother was arrested in December 2015 (while pregnant with Sibling) for domestic violence against Father; Mother denied drug use even though she tested positive for methamphetamine and THC at Sibling's birth in May 2016; in August 2016, Mother and Father were cited for possession of a controlled substance, possession of concentrated cannabis, and possession of drug paraphernalia after both parents were found sleeping in a vehicle that contained over 43 grams of methamphetamine; Mother violated a restraining order; after Sibling was returned to Mother's care, Mother dropped out of the Healthy Moms program and did not engage in services; and the Department discovered that Mother had lied about having housing.

As to the parents' treatment history, Mother attended outpatient treatment through Healthy Moms only sporadically and failed to attend her AOD intake appointment. On October 21, 2016 – the day after Sibling was returned to her care – Mother failed to

complete a scheduled hair follicle drug test, and she failed to attend a second scheduled drug test in December 2016. Later she tested positive for THC. Father attended outpatient treatment through AOD only sporadically from October 2016 through April 2017, and tested positive for alcohol or methamphetamine, or both, on 10 occasions during this period. Based in part on input from the AOD program, the Department recommended that Father complete six months of inpatient AOB treatment, but Father refused. He began attending Crossroads residential treatment program in June 2017.

Finally, even after services had been bypassed as to Sibling in June 2017, Father missed five visits with the Minor, appeared to be under the influence at one of the visits, and refused to attend a parenting class because he did not have time.

At the contested disposition hearing, Father admitted that he had been using methamphetamine for decades since his twenties and also used marijuana. He had been sober for nearly eight months, attended a 90-day residential treatment and aftercare program at Crossroads, completed a parenting class, and attended "NA" and "AA" meetings but did not have a sponsor. Mother testified that she used methamphetamine just before Sibling's birth on May 9, 2016 and had a methamphetamine problem at that time. She tested positive for THC in September 2017.

On March 1, 2018, the court entered an order removing the Minor from Mother's and Father's custody (§ 361, subd. (c)), bypassing reunification services (§ 361.5, subds. (b)(10), (13)), and setting a selection and implementation hearing (§ 366.26) for June 25, 2018.

4. Parents' Appeal and Writ Petitions

Mother and Father sought relief from the court's jurisdictional findings and disposition order on two fronts.

First, they each filed a petition for extraordinary writ relief in this court under California Rule of Court, rule 8.452 (A153831). We limited our review to issues cognizable under rule 8.452 and denied their petitions in June 2018. As to the removal of the Minor from parental custody at disposition (§ 361, subd. (c)), we concluded that substantial evidence supported the court's finding that it would be detrimental to return

the Minor to Mother or Father based on Mother's failure to make substantial progress on her plan and Mother's and Father's lack of credibility with respect to their substance abuse and services. We also concluded that substantial evidence supported the court's conclusion that bypassing reunification services was appropriate under subdivision (b)(10) of section 361.5. (*B.K. v. Superior Court* (Jun. 13, 2018, A153831), [unpub. opn.] 12–16.)

Second, they each filed a notice of appeal from the disposition order, which commenced the present appeal.[3]

5. Further Proceedings

Mother and Father subsequently filed section 388 petitions in the juvenile court, seeking modification of the disposition order based on alleged changed circumstances. After a joint hearing on their section 388 petitions and section 366.26 matters in June 2018, the court denied their petitions, terminated their parental rights, and identified adoption as the permanent plan for the Minor. These orders are the subject of a separate appeal filed by Mother and Father (appeal number A154714).

II. DISCUSSION

Father and Mother contend the matter should be remanded for compliance with ICWA requirements and there was insufficient evidence to support the court's jurisdictional findings.

A. ICWA

If the juvenile court knows or has reason to know that an "Indian child" is involved in a proceeding involving the foster care or adoptive placement of, or termination of parental rights to, the Indian child, ICWA requires the Department to notify the Indian child's tribe of the proceedings and its right of intervention. (25 U.S.C.

[3] Father's notice of appeal indicates that his appeal is from "Jurisdiction and Disposition 3/2/18 – removal of child and denial of reunification services." We construe the notice of appeal broadly to encompass not only the removal and reunification bypass issues (which we rejected in writ proceeding A153831), but also the issues he raises in his opening brief in this appeal.

§ 1912(a).) An "Indian child" is defined as an unmarried person under the age of 18 who is either (1) an enrolled member of an Indian tribe or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4).)

ICWA does not explicitly define when there is a "reason to know" a child is an Indian child or explicitly require the Department to conduct an inquiry into whether a child is an Indian child. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1158 (*S.B.*); *In re H.B.* (2008) 161 Cal.App.4th 115, 120 (*H.B.*).) Under the California law implementing ICWA, however, the court and county welfare department "have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . has been filed, is or may be an Indian child," including asking the child, parents, and family members. (§ 224.2, subds. (a), (b).) If the court or social worker has reason to know that an Indian child is involved, the Department must send notice, return receipt requested, to "all tribes of which a child may be a member . . . or eligible for membership." (§ 224.3, subd. (a)(3)(A); see Cal. Rules of Court, rule 5.481.) Such notice is intended to ensure that a designated person for the tribe has the opportunity to determine whether a minor is a member of the tribe or eligible for membership and whether the tribe will elect to participate in the proceedings. (*In re J.T.* (2007) 154 Cal.App.4th 986, 994.) The Department must file with the juvenile court the ICWA notice, return receipts, and any response received relevant to the child's Indian status. (§ 224.3, subd. (c); see Cal. Rules of Court, rule 5.482(a)(1).) Where notice to the tribe is required, no foster care placement or termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or Bureau of Indian Affairs. (25 U.S.C. § 1912(a); § 224.3, subd. (d); Cal. Rules of Court, rule 5.482(a)(1).)

Here, the Department's Detention Report of July 6, 2017 asserted that ICWA did not apply. The Department explained: "The mother has reported no known Native American ancestry. The father has reported that he *may* have Cherokee and Choctaw heritage. In the full-sibling's case, ICWA-30s were mailed to all the Cherokee and Choctaw bands on 6/27/2016 and again on 10/18/2016. The Cherokee Nation responded

stating *the sibling is not eligible*. There was no response from the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee, the Choctaw Nation of Oklahoma, the Jena Band of Choctaw, and the Mississippi Band of Choctaw Indians. On 06/07/2017, the Court found that the Indian Child Welfare Act *did not apply to [the Minor's] full-sibling*." (Italics added.)

At the detention hearing on July 6, 2017, the following discourse took place regarding ICWA matters: "[THE COURT:] The Court will note in the report that as to [Sibling] there was a finding made at that time, and if she's a full sibling, then the Indian Child Welfare Act would not apply. [¶] [FATHER'S COUNSEL]: So there's ancestry through Cherokee and Choctaw, but he's currently not an enrolled member in any tribe.[4] [¶] THE COURT: The Court would indicate that for the Indian Child Welfare Act to apply, it would need to have a parent being an enrolled member of the tribe and a child eligible for enrollment. So at this time the Court is making a finding that the Indian Child Welfare Act does not apply; though obviously the Department needs to be in further inquiry, as required by law."

In the Department's Jurisdiction Report and Detention Report, the Department stated that the court had found in July 2017 that ICWA did not apply to the Minor and no new information regarding Native American ancestry had been received. It does not appear from the record that the Department sent new ICWA-030 notifications to the tribes in the *Minor's* proceeding (and the Department did not represent that it had). Nor is there any indication that Father – or anyone – objected to the Department's representations, asserted ICWA applied, or questioned the sufficiency of the Department's compliance with ICWA and related California law.

[4] Father attributes the statement to "counsel for the department." According to the reporter's transcript, it was stand-in counsel for Father.

For the first time in these exhaustively-litigated proceedings, Father now contends the Department and trial court failed to satisfy their duties with respect to ICWA. The argument is unavailing.[5]

In the first place, there is no indication that the proceedings in this case were conducted in violation of ICWA itself. There is no evidence that the court had reason to believe that the Minor is an Indian child, since Father represented that he was *not* an enrolled member of the tribes, there had already been a finding that ICWA did not apply to the Minor's full-sibling, and the Cherokee Nation Band determined that Sibling was not eligible for tribal membership. Nor is there any indication that the Department failed to comply with any notice or inquiry requirements set forth in ICWA itself.

It does appear that the Department did not send notification to the tribes as provided by California law in section 224.3. But that section requires notice to be sent only if the court or social worker knows or has reason to know that an Indian child is involved, as set forth in section 224.2, subdivision (d). (See § 224.3, subd. (a).) Father fails to demonstrate that any of the circumstances enumerated in subdivision (d) of section 224.2 applies here.

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5 The Department urges that Father waived any ICWA-related challenge by failing to raise the issue earlier. Indeed, Father did not object to the Detention Report, the Jurisdiction Report, or the Disposition Report regarding the Department's ICWA inquiry; he did not object to the juvenile court's finding at the detention hearing that ICWA did not apply; and he did not object to any of the subsequent hearings on ICWA grounds. As a general matter, however, a parent does not (or cannot) waive the notice requirements of ICWA by failing to raise them in the juvenile court, since the ICWA notice provisions serve the interests of the tribes. (*In re S.B., supra*, 130 Cal.App.4th at p. 1159.) In fact, an error in notice can be challenged at any time in the juvenile court, and even for the first time on appeal. (*In re Isaiah W.*, (2016) 1 Cal.5th 1, 9–13, (*Isaiah W.*).) On the other hand, Father not only failed to raise the matter in the juvenile court, he failed to raise it in *this* court in his earlier petition for writ review of the Minor's removal from his custody at disposition (A153831). (Cf. *In re X.V.* (2005) 132 Cal.App.4th 794, 804 ["We do not believe Congress anticipated or intended to require successive or serial appeals challenging ICWA notices for the first time on appeal."]; *Isaiah W., supra*, 1 Cal.5th at p. 14 [leaving the question open].) Nonetheless, we need not and do not rely on a doctrine of waiver or forfeiture to resolve Father's ICWA challenge.

Instead, Father argues that the Department had a continuing affirmative duty of inquiry that applies even if a sibling is established not to be eligible for tribal enrollment. (Citing *In re Desiree F*. (2000) 83 Cal.App.4th 460, 470 (*Desiree*) [reliance upon a letter from a former tribal chairman that a sibling is not a tribal member does not satisfy the duty to inquire regarding the later-born child now before the court]; *Isaiah W.*, *supra*, 1 Cal.5th at p. 11 [juvenile court has present duty to inquire whether minor was an Indian child at each stage of the proceeding until court validly determines ICWA inapplicable]; *In re Elizabeth M*. (2018) 19 Cal.App.5th 768.)

The cases on which Father relies are distinguishable. *Desiree* ruled that the court's reliance on a letter about the minor's sibling was erroneous because it came from a formal tribal chairman, *not* the tribal council, and therefore had no evidentiary value. (*Desiree, supra*, 83 Cal.App.4th at p. 472.) None of the cases involved a situation where, as here, the person with the alleged Indian heritage expressly represented that he was not an enrolled member of the tribe. Furthermore, the duty of *inquiry* (§ 224.2, subd. (a)) does not compel the issuance of *notice* to tribes when there is no reason to believe the Minor was an Indian child (§ 224.3, subd. (a)).

In any event, any shortcoming as to inquiry or notice under sections 224.2 and 224.3 was harmless. An ICWA violation may be harmless where, even if notice had been given, the child would not have been found to be an Indian child. (*In re S.B.*, *supra*, 130 Cal.App.4th at p. 1162.) Moreover, "[a]ny failure to comply with a higher state standard, above and beyond what the ICWA itself requires, *must* be held harmless unless the appellant can show a reasonable probability that he would have enjoyed a more favorable result in the absence of the error." (*Ibid.*, italics added; *H.B.*, *supra*, 161 Cal.App.4th at p. 121 ["A violation of ICWA notice requirements may be harmless error, particularly when, as here, the source of the duty to inquire is not ICWA itself but rather . . . a rule of court implementing ICWA."].)

Here, Father fails to demonstrate any possibility that Minor would have been determined to be an Indian child if notice to the tribes had been given. Nor does he demonstrate that he would have obtained a more favorable result at the jurisdiction or

disposition hearings. Even if notice had been sent and ICWA was deemed to apply, the findings ICWA would have required would be satisfied by the findings that the court actually made in this proceeding. (*In re S.B.*, *supra*, 130 Cal.App.4th at pp. 1164–1165.)

Father has not established cause for remand. (See *In re E.W.* (2009) 170 Cal.App.4th 396, 400, 402 [harmless error where one sibling was inadvertently omitted from notice to the tribe, where the siblings had the same father and tribal investigations determined one of them was not an Indian child; remand would be "an empty exercise with a preordained outcome"]; *In re J.M.* (2012) 206 Cal.App.4th 375, 383 [failure to include one of two children in ICWA notice was harmless because they were siblings and both claimed any Indian heritage through the same parent]; *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539 ["Where, as here, the record is devoid of any evidence a child is an Indian child, reversing the judgment terminating parental rights for the sole purpose of sending notice to the tribe would serve only to delay permanency for a child such as [the minor] rather than further the important goals of and ensure the procedural safeguards intended by ICWA."]; *In re H.B.*, *supra,* 161 Cal.App.4th at p. 122 ["Parents unable to reunify with their children have already caused the children serious harm; the rules do not permit them to cause additional unwarranted delay and hardship, without any showing whatsoever that the interests protected by the ICWA are implicated in any way."].)

B. Jurisdictional Findings

Father and Mother next contend there was insufficient evidence to support a jurisdictional finding under subdivision (b) or subdivision (j) of section 300. We will affirm a jurisdictional order if at least one of the jurisdictional grounds is supported by substantial evidence. (See *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.)

1. Section 300, Subdivision (b)

Section 300, subdivision (b) provides that a child comes within the jurisdiction of the juvenile court if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . or by the inability

of the parent or guardian to provide regular care for the child due to the parent's or guardian's . . . substance abuse."

To establish jurisdiction under section 300, subdivision (b), the Department must show that at the time of the jurisdictional hearing the child is at substantial risk of serious harm in the future. (*In re James R.* (2009) 176 Cal.App.4th 129, 135; see *In re Melissa H.* (1974) 38 Cal.App.3d 173, 175.) In making this determination, the court may consider past events where there is a reasonable basis for believing they will recur. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.) For children of "tender years," substance abuse by a parent is prima facie evidence of substantial risk of physical harm. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 766–767.)

a. Jurisdictional Finding Based on Father's Conduct

Substantial evidence supported the conclusion that Father's issues posed a substantial risk of serious harm to the Minor. Father had a long history of substance abuse and related crime. A little over a year before the Minor was born, he was arrested for possession of controlled substances. He began substance abuse treatment but, after Sibling was returned to his care, his attendance at group meetings was sporadic and he provided a diluted test sample that counted as a positive test. At a meeting with social workers, he appeared under the influence and admitted he was using methamphetamine. Even after Sibling was detained for the second time – six weeks before the Minor's birth – Father initially resisted more intensive treatment than recommended and admitted to social workers and his substance abuse counselor that he continued to use methamphetamine. By the time of the jurisdiction hearing for the Minor, Father had been in residential treatment for only as much as four months.

In light of the evidence, it was not unreasonable for the court to conclude, for purposes of jurisdiction, that there was a substantial risk the Minor would suffer serious physical harm as a result of Father's failure or inability to adequately supervise or protect the Minor or his inability to provide regular care for her due to his substance abuse.

Father acknowledges that he was a substance abuser with a long history of substance-related criminal charges, positive drug tests before the second removal of

Sibling, and drug use during Sibling's case. However, he contends, there was no evidence his drug use had caused any actual harm to Sibling. Further, he argues, he was in residential treatment by the time of the Minor's birth, and by the time of the jurisdiction hearing he had graduated from the treatment program, was in aftercare, and had been drug-free for four months. He also notes the Department's remarks that Sibling appeared happy and there were no issues during visits or in the observed interactions between Father and the Minor (during visitation).

Jurisdiction under subdivision (b) of section 300 does not require proof that the child or Sibling has already suffered actual harm. (*In re Kadence P.* (2015) 241 Cal.App.4th 1376.) And while there was indication of Father's four months of sobriety and a treatment program, it was reasonable to conclude there remained a substantial risk of serious harm in light of the duration and intensity of Father's substance abuse history. It is not our role to reweigh the evidence, but merely to determine whether there was substantial evidence to support the court's conclusions. In this case, there was.[6]

b. Jurisdictional Finding Based on Mother's Conduct

Substantial evidence also supports the conclusion that Mother's issues posed a substantial risk to the Minor for purposes of section 300, subdivision (b). Only about a year before the Minor was born, Mother tested positive for methamphetamine, amphetamine and marijuana, and Sibling tested positive for methamphetamine and amphetamine at birth. Mother said she had started using methamphetamine in 2012 and used it during pregnancy. Mother began an outpatient treatment program, but soon after Sibling was returned to her care, Mother failed to follow through on the court's family maintenance orders. Sibling was detained for the second time six weeks before Minor was born. In the same month as Minor's birth, the court found by clear and convincing evidence it would be detrimental to return Sibling to her custody. By the time of the jurisdiction hearing for Minor, Mother had only been in treatment for four months; she

[6] In addition to his jurisdictional argument, Father contends in his opening brief that the court erred in removing the Minor at disposition. We addressed this issue in A153831. His arguments in his opening brief do not change our view or establish error.

had recently tested positive for THC, in violation of her treatment program's rules; and she had not yet started the second phase of her treatment.

Mother argues that there was no evidence she used methamphetamine after May 7, 2016 (two days before Sibling's birth) and there was no evidence her recent positive test for THC had any effect on her parenting. She insists there was no evidence that her drug use had placed the Minor at substantial risk of harm or that the Minor faced future harm.

Mother's arguments are unpersuasive. The fact that she used methamphetamine during her pregnancy is evidence that her past drug use affected her ability to protect her child. And whether or not she had already inflicted harm on her children, it was reasonable under the totality of the circumstances to conclude that there was a substantial *risk* of serious harm to the Minor.

2. Section 300, Subdivision (j)

Because we conclude that substantial evidence supported the court's finding of jurisdiction under section 300, subdivision (b), we need not and do not decide whether substantial evidence also supported the court's finding of jurisdiction under section 300, subdivision (j). (*Alexis E., supra*, 171 Cal.App.4th at p. 451.)

III. DISPOSITION

The order is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A153816)